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90-372

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT GIGANTE,
Petitioner,

v.

RUNSHIP, LTD., and LAURITZEN REEFERS, A/S,
Respondents

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENTAL APPENDIX

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

COUNTERSTATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 3

I. Respondents Concur That There Is A Conflict Between The Third And Fifth Circuit Courts of Appeals Regarding A Shipowner's Liability For Improperly Stowed Cargo, However, The Present Case Does Not Properly Present This Conflict For Review Because Even Under The Fifth Circuit's Decision In *Woods v. Sammisa Co., Ltd., et al.*, 873 F.2d 842 (5th Cir. 1989), cert. *denied*, 110 S.Ct. 853 (1990), Summary Judgment Was Properly Granted In The Present Case 3

A. The Third Circuit's Holding In *Derr*, As Well As The Decisions Of The Lower Court And Third Circuit In The Instant Case, Are In Complete Accord With The Legislative History Behind The 1972 Amendments To The Longshore And Harbor Workers' Compensation Act, As Well As This Court's Decision in *Scindia* 4

B. The Petition For Certiorari Should Be Denied Because The Present Case Does Not Properly Present For Review The Conflict Between The Third And Fifth Circuits Regarding A Shipowner's Liability For Improperly Stowed Cargo Because Even Under *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 853 (1990), Summary Judgment Was Properly Granted In This Case 7

CONCLUSION 10

SUPPLEMENTAL APPENDIX

TABLE OF AUTHORITIES

Cases: Page

Derr v. Kawasaki Kisen K.K., 835 F.2d 490 (3d Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988) 4, 5, 7

Robertson v. Tokai Shosen K.K., 655 F.Supp. 152 (E.D. Pa. 1987) 7

Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977) 8

Scindia Steam Navigation, Ltd. v. DeLos Santos, 451 U.S. 156 (1981) 6, 8

Turner v. Japan Lines, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982) 4

Woods v. Sammisa Co., Ltd., 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 853 (1990) 4, 5, 9, 10

STATUTES:

Longshore and Harbor Workers Compensation Act, Section 5(b), 33 U.S.C. 905(b) 4

AUTHORITIES:

Restatement (Second) of Torts

Section 409 8

Section 412 7

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The Petition accurately states that petitioner, Robert Gigante, a longshoreman, was injured while discharging palletized units of cartons of apples from the No. 2 hold of the MALAYAN REEFER, a cargo ship which was owned by respondent Runship, Ltd., and operated by respondent Lauritzen Reefers, A/S. The Petition also accurately states that respondents had a Port Captain present in Chile where the palletized units of apples were loaded into the vessel by an independent stevedoring contractor. However, contrary to any suggestion contained in the Petition, neither respondent was in any way involved with the loading or discharge of the cargo from the MALAYAN REEFER. Specifically, contrary to the statement at page 5 of the Petition, respondent Lauritzen Reefers, A/S did not determine the size of the "key" to be created by the loading

stevedore, or give any instructions or directions to the loading stevedore with regard to the size of the "key". In fact, the size of the "key" was determined by the discharging stevedore in the United States, petitioner's own employer.

The testimony petitioner relies upon in asserting that respondent Lauritzen Reefers, A/S participated in determining the size of the "key" is the testimony of Claus Pavar, Port Captain for respondent Lauritzen Reefers. Captain Pavar, however, specifically stated during his deposition that it was Holt Cargo Systems, Inc., the discharging stevedore and petitioner's own employer, who determined how large a "key" was needed:

> Q. And how did you arrive at how large a key was needed?
>
> A. Well, according to Holt, the space needed was to get enough room to use the chandeliers.
>
> Q. And that was your understanding, that they only had to have enough space to use the chandeliers?
>
> A. Yes.
>
> Q. Did you decide how large a space that was in terms of feet or number of units?
>
> A. No, that was more or less a number of units, a minimum of ten units would make space for the chandeliers.
>
> Q. You — in your view ten units?
>
> A. Yes, and according to Holt's stevedores.
>
> Q. Who in Holt told you that?
>
> A. Pardon?
>
> Q. Who in Holt told you that ten units would be enough?
>
> A. Well, I talked of course with the stevedoring supervisors and as I mentioned before, Joe Cain and also Michael Donahue.

(See Appendix in Court of Appeals, pages 94A-95A). Further, Captain Pavar testified that it was the decision of the shipper and loading stevedore in Chile, *not* the decision of respondent

Lauritzen Reefers, to place 13 pallets in this particular "key":

> Q. Generally, who determined how many pallets in each deck were preslung on these ships?
>
> A. That was decided by the shippers' organization together with the stevedore.

(See Appendix in Court of Appeals, page 50A). The portion of Captain Pavar's testimony which petitioner relies upon does not support a contrary position. (*See* Appendix in Court of Appeals, pages 122a-124a, reproduced in the Supplemental Appendix at 4b-6b).

Furthermore, respondents also deny that there was any evidence that they had "actual knowledge" that the size of the "key" was unsafe or dangerous. Respondents only admitted that they had "actual knowledge" of *size* of the "key", as did anyone who viewed the cargo upon the completion of stowage or prior to discharge; respondents never admitted and, in fact, have specifically denied, having any knowledge that the size of key was *unsafe* or *dangerous*. There was no evidence submitted by petitioner to support a contrary finding.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Respondents Concur That There Is A Conflict Between The Third And Fifth Circuit Courts of Appeals Regarding A Shipowner's Liability For Improperly Stowed Cargo, However, The Present Case Does Not Properly Present This Conflict For Review Because Even Under The Fifth Circuit's Decision In *Woods v. Sammisa Co., Ltd., et al.*, 873 F.2d 842 (5th Cir. 1989), cert. denied, 110 S.Ct. 853 (1990), Summary Judgment Was Properly Granted In The Present Case.

The Petition accurately states that the District Court granted summary judgment in the present case, and the Court of Appeals affirmed, based upon the holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), cert. denied, 486 U.S. 1007 (1988). The Petition also accurately states that the decision in *Derr* is in conflict with the decision handed down by the Fifth Circuit Court of Appeals in *Woods v. Sammisa Co.*,

Ltd., 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 853 (1990). In fact, in *Woods*, the Fifth Circuit Court of Appeals specifically admitted that its holding was contrary to the Third Circuit's holding in *Derr*. *Woods*, 873 F.2d at 848. Furthermore, the Petition accurately states that the negligence remedy provided under §5(b) of the Longshore and Harbor Workers' Compensation Act, insofar as it relates to a shipowner's responsibility for the condition of cargo stowed by an independent stevedoring contractor, is not being interpreted and/or applied uniformly throughout the country, contrary to the express intent of Congress.[1] The present case, however, does not properly present this conflict for review because even under the Fifth Circuit's decision in *Woods v. Sammisa Co., Ltd., et al.* 873 F.2d 842 (5th Cir. 1989), *cert. denied* 110 S. Ct. 853 (1990), summary judgment was properly granted in the present case.

A. The Third Circuit's Holding In *Derr*, As Well As The Decisions Of The Lower Court And Third Circuit In The Instant Case, Are In Complete Accord With The Legislative History Behind The 1972 Amendments To The Longshore And Harbor Workers' Compensation Act, As Well As This Court's Decision in *Scindia*.

In *Derr*, the Third Circuit Court of Appeals held that a vessel owner has no duty to inspect or supervise the loading of cargo by a stevedore, foreign or domestic, and that a vessel owner has no duty to inspect the cargo prior to turning it over to the discharging stevedore. *Derr*, 835 F.2d at 493-494. Furthermore, the Third Circuit held that even if a vessel has actual knowledge of a dangerous condition involving the cargo, the vessel at most has a duty to warn the stevedore about the condition, and even this duty is negated if the condition is open and obvious. *Id.* at 496. The Petitioner in this case, does not

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1. While the Fifth Circuit Court of Appeals admitted that its holding in *Woods* was contrary to the Third Circuit's prior holding in *Derr*, the Third Circuit admitted that its holding in *Derr* was contrary to the prior holding of the Ninth Circuit in *Turner v. Japan Lines*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982).

argue that the District Court, or the Court of Appeals, misapplied the holding in *Derr* to the facts of this case but, instead, argues that *Derr* is not a correct interpretation of the 1972 Amendments to the Longshore and Harbor Worker's Compensation Act and this Court's decision is *Scindia*. However, Petitioner's argument that a shipowner should be responsible for the work of an independent stevedoring contractor in a foreign port is without merit. In *Derr*, the Third Circuit properly interpreted the legislative history behind the 1972 Amendments and this Court's decision in *Scindia*.

In *Scindia*, this Court clearly and unequivocably held that a shipowner has no duty to inspect or supervise the cargo operations of stevedores, foreign or domestic. This Court said "[t]he shipowner, within limits, is entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations." *Scindia*, 451 U.S. at 172 (1981). Furthermore, this Court held that the shipowner is not liable for the negligence of the independent stevedore. Congress' intent in passing the 1972 Amendments was "to terminate [the vessel's] automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore." *Id.* at 168. Thus, this Court concluded that a vessel owner does not have a duty "to discover and correct dangerous conditions that develop during the *loading* or *unloading process*." *Id.* at 169. This Court recognized that imposing such a duty "would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship." *Id.*

Petitioner's effort to limit the holding in *Scindia* to domestic stevedores, and to make the shipowner liable for the negligence of a foreign loading stevedore, makes absolutely no sense as the lower court pointed out in *Robertson v. Tokai Shosen K.K.*, 655 F.Supp. 152 (E.D. Pa. 1987), the companion case to *Derr*:

> Now, if one may not find the vessel liable for wrongs of the off-loading stevedore under the Act, then one can no more

> find the vessel liable for wrongs of the on-loading stevedore – assuming for the moment that such wrongs are committed.
>
> . . .
>
> If I were to adopt the position ably advocated by plaintiff's counsel, I would eviscerate *Scindia* and the Act. Otherwise, while the vessel would not be required to supervise and inspect each stevedoring operation, *Scindia*, it would be held to such a requirement at each subsequent port which encountered the condition of the stow. This makes no sense, and would render the principle of fault based liability of the vessel a nullity.

Robertson, 655 F.Supp. at 154-155.

The Third Circuit Court of Appeals agreed with the lower court's rationale and concluded that, "the real issue is not where the cargo was loaded, but whether a vessel may be held negligent for failure to inspect or supervise the stowage of cargo." *Derr*, 835 F.2d at 495. The Third Circuit also noted that "the scheme carefully drawn by Congress and interpreted in *Scindia* does not change because the cargo stowage was performed by foreign stevedores." *Id.*

Petitioner also argues that §412 the *Restatement of Torts (Second)*, is the applicable standard which should be applied to the shipowner's responsibility for the negligence of a stevedore. However, §412 of the *Restatement* is not a "basic and well established principle of land side law." Rather, it is an exception to the general rule regarding the liability of employers for the actions of independent contractors. The exception applies only to employers who have a duty to maintain land or chattels, and it has no application in the present case and clearly does not establish the duties of a vessel owner regarding cargo loaded by an independent stevedore. If resort need be had to the *Restatement* for defining the duties of the vessel owner, the applicable section would be §409, not §412. See, e.g., *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977). Under §409, "before liability can attach for such independently created

danger, the owner must have knowledge of its existence and an opportunity to alleviate it." *Id.* at 862.

In fact, in *Scindia*, this Court rejected the principle of §412 of the *Restatement*, which would make the vessel owner liable for supervising the work of the stevedore:

> As a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards. Section 41 of the Act, 33 U.S.C. §941, requires the stevedore, the longshoremen's employer, to provide a "reasonably safe" place to work and to take such safeguards with respect to equipment and working conditions as the Secretary of Labor may determine to be necessary to avoid injury to longshoremen. The ship is not the common employer of the longshoremen and owes no such statutory duty to them.

Scindia, 451 U.S. at 169-170.

B. The Petition For Certiorari Should Be Denied Because The Present Case Does Not Properly Present For Review The Conflict Between The Third And Fifth Circuits Regarding A Shipowner's Liability For Improperly Stowed Cargo Because Even Under *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 853 (1990), Summary Judgment Was Properly Granted In This Case.

In *Woods*, the Fifth Circuit Court of Appeals held that when a vessel owner turns a vessel over to a stevedore, it must "exercise due care to ensure that the vessel's cargo is loaded such that it can be discharged with reasonable safety." *Woods*, 873 F.2d at 850. Accordingly, the Fifth Circuit held that a vessel owner may be liable for injuries resulting from negligently stowed cargo if "a reasonable owner/operator . . . would have perceived the dangers" presented by the condition of the cargo. *Id.* at 852. In other words, the vessel owner may be found liable if it "knew or should have known of the dangerous condition." *Id.* at 850.

In *Woods*, there was evidence from which it could be found that the vessel owner "knew or should have known" of the danger involved. In that case, the plaintiff, a longshoreman, was injured while discharging steel located in the hold of the vessel. "In the forward half of the hold was steel pipe bound for Houston (the 'Houston Pipe'); the aft half contained the pipe which [plaintiff's] crew was directed to discharge (the 'New Orleans pipe')." *Id.* at 845. Prior to the commencement of the discharge operation,

> the longshoreman looked into the hold . . . [and] noticed that, to varying degrees, the aft ends of some of the Houston pipe overlapped the forward ends of the New Orleans pipe. . . .
>
> The longshoremen agreed among themselves that it was a "bad stow," and the crew's superintendent told members of the ship's crew that the discharge would have to proceed very slowly because of the cargo's condition.

Id. As a result of the improper stowage of the pipe, the plaintiff was injured during the discharge operation.

In the present case, there is no evidence from which it could be determined that the vessel owner "knew or should have known" of the alleged danger involved. As previously noted, respondent Lauritzen Reefers, A/S only had knowledge of the size of the "key;" there is absolutely no evidence from which it could be inferred that respondents "knew or should have known" of the *danger* involved. In fact, the evidence showed that thirteen (13) prior vessels operated by respondent Lauritzen Reefers, A/S had come into the Port of Philadelphia in the 1984-85 fruit season with the same or approximately the same size "keys", and the discharge operations proceeded on those vessels without incident. (*See* Appendix in Court of Appeals at pages 46A, 73A-74A, reproduced in the Supplemental Appendix at 1b, 3b-4b). Furthermore, on the day of the incident in question, the petitioner and the other longshoremen were obviously aware of the size of the "key," yet no complaints were made to the vessel about its size. (*See* Appendix in Court

of Appeals at pages 71A-72A, reproduced in the Supplemental Appendix at 1b-2b.) Therefore, contrary to the situation in *Woods*, there is no evidence that the vessel owner knew or should have known that the cargo was stowed in an improper or dangerous manner. Thus, even under *Woods*, summary judgment would have been granted in this case.

Furthermore, as previously noted, the evidence presented established that the size of the "key" was not determined by the respondents but, instead, was determined by the discharging stevedore, petitioner's own employer. Thus, the petitioner cannot assert that the respondents should have known that the size of the "key" was improper or posed a danger to the longshoreman since his own employer, an expert in stevedoring operations, determined that the size of the "key" was sufficient.

Finally, in this case, petitioner is not seeking to impose liability upon the respondents for the negligence of the loading stevedore as was the case in *Woods*. Instead, petitioner is seeking to impose liability upon the vessel defendants for the negligence of his own employer, the discharging stevedore. Contrary to the case in *Woods*, the cargo in this case was not stowed improperly by the foreign loading stevedore; it was stowed exactly as Holt, the domestic discharging stevedore, said it should be stowed. Therefore, the alleged negligence at issue is the negligence of the discharging stevedore in determining the size of the key. Accordingly, the present case does not properly present for review the conflict between the Third and Fifth Circuits regarding a shipowner's liability for improperly stowed cargo because even under the Fifth Circuit's decision in *Woods*, summary judgment was properly granted in this case.

CONCLUSION

Although respondents concur with Petitioner that there is a conflict between the Third and Fifth Circuits regarding a shipowner's liability for improperly stowed cargo, the present case does not properly present this conflict for review because even under the Fifth Circuit's decision in *Woods v. Sammisa Co., Ltd., et al.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 853 (1990), summary judgment was properly granted in this case.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Excerpt from Court of Appeals Appendix — 46A

Claus Pavar — Direct/Buchholz

A. Philadelphia.

Q. What were your duties as port captain assigned to Philadelphia during — at that time?

A. I was coordinating the arrival and discharge and the delivery of the fruit.

Q. Of fruit vessels?

A. Yeah, fruit vessels.

Q. How many fruit vessels did Lauritzen bring to Philadelphia during the 1985 fruit season?

A. There was a total of fourteen vessels in '85 season.

Q. That would be from January until about June?

A. Yeah, generally through May.

Q. Through May?

A. Yeah.

Q. January through May.

And of the fourteen, does that include a vessel called the Malayan Reefer?

A. That's correct.

Q. These fourteen vessels, were they all refrigerated vessels?

A. Yes.

Q. And we call them reefer ships; is that right?

A. That's right.

Q. Did you remain in Philadelphia for the 1985

Excerpt from Court of Appeals Appendix — 71A

Claus Pavar — Direct/Buchholz

MR. BUCHHOLZ: Right, thirteen pallets in that entire area.

THE WITNESS: That's right, thirteen in the area.

BY MR. BUCHHOLZ:

Q. And you say that would have created an area — a space about a hundred and seventy square feet?

A. Yeah, for – where the thirteen pallets was, yes.

Q. Could you tell if the longshoremen had begun to take out any of the remaining pallets, the ones that had not been preslung, before the accident?

A. Yes, they did start to take out the remaining –

Q. Could you tell how many?

A. Two.

Q. They'd taken out two?

A. Yes.

Q. Had you received any complaints from the longshoremen or the stevedores about the size of the key in the C deck of the number two hatch prior to the accident?

A. No, I had not.

Q. Had you received any complaints from the longshoremen or the stevedores that there was not sufficient room in the key of the C deck for the

Excerpt from Court of Appeals Appendix – 72A

Claus Pavar – Direct/Buchholz

longshoremen to safely work prior to the accident?

A. Nobody.

THE VIDEOTAPE OPERATOR: Sir, keep you voice up.

THE WITNESS: Sorry, yes.

BY MR. BUCHHOLZ:

Q. What was the average number of preslung pallets in the decks of the fruit ships during the '85 fruit season?

MR. SOVEL: Objection.

THE WITNESS: They were between ten and eighteen pallets, preslung pallets, in the decks.

BY MR. BUCHHOLZ:

Q. Do you – does the stowage plan that we – do you have a stowage plan which would show the number of preslung pallets in the various decks?

A. Yeah – on this particular vessel?

Q. Yes, on the Malayan Reefer.

A. Yes.

Q. Let me mark this Pavar-9.

Can you tell us what – this is a cross-section of the ship; is that right?

A. Yes, that's correct.

Q. Where's the forward end?

Excerpt from Court of Appeals Appendix – 73A

Claus Pavar – Direct/Buchholz

A. Forward end is up here. This is hatch number one, with three decks. This is hatch number two, this is hatch number three and this is hatch number four, the after end of the vessel.

And on each deck the preslung pallets has been marked. For instance in number 1A deck, the thirteen preslung pallets; B deck, fourteen preslung; and in 1C deck, fourteen.

In Hold Number two, 2A deck was empty, and there was empty space in the square of 2B deck. There was no preslung pallets here, and in 2C deck there were thirteen preslung pallets and in 2D deck, sixteen preslung pallets.

And in number 3A, ten; 3B, thirteen; 3C, twelve; and 3D twelve with slings.

And hatch number four, A deck, fourteen; B deck was empty space in the square, no preslung; and in C deck, eleven pallets with slings.

Q. So it varied from -- what was the least number of preslungs?

A. It varied from ten to sixteen in this vessel here.

Q. And how many were in the C deck where this accident took place?

A. Thirteen.

Q. During the 1985 fruit season, had there been

Excerpt from Court of Appeals Appendix – 74A

Claus Pavar – Direct/Buchholz

any complaints made to you by the stevedore about the size of the keys in any of the fourteen fruit ships?

A. No.

MR. SOVEL: Objection.

Q. Had you been aware of any problem with the size of the keys on any of the fourteen fruit ships?

A. No, we hadn't any problems.

Q. When you got to the number two hatch after you learned of this accident, describe what you saw?

A. When I came down on the deck and went to hatch number two, I looked down in the hatch.

I saw the cartons of apples scattered all over the deck from the middle of the deck and forward part of it mainly.

Q. Is that what's shown in –

A. Yeah, that's –

Q. – photograph Pavar-8?

A. Yeah, that's a photograph I took at that time.

Q. What else did you observe?

A. Yeah, I observed that – that the pallets they were about to discharge were hanging on the hook over the deck, and –

Q. When you say the hook do you mean the chandelier?

A. Well, the chandelier is hooked through a hook –

Excerpt from Court of Appeals Appendix – 121A

Claus Pavar – Recross/Sovel

BY MR. SOVEL:

Q. Captain, in determining the rate –

MR. BUCHHOLZ: Objection. This is beyond the scope of redirect.

MR. SOVEL: Stop – you haven't even heard the question, Mr. Buchholz.

BY MR. SOVEL:

Q. In determining the rate that Lauritzen was paying Holt for discharging these cargos, was not the

Excerpt from Court of Appeals Appendix – 122A

Claus Pavar – Recross/Sovel

fact that they were going to use these spreaders, chandelier

spreaders, and the speed at which they could discharge the cargo using those spreaders, a factor that was considered?

MR. BUCHHOLZ: Objection.

THE WITNESS: I cannot tell, but I can only tell that Holt are using the chandeliers, and they want to use the chandeliers, and that's their operation.

BY MR. SOVEL:

Q. But they quote you a rate per unit, do they not, or a rate per ton of cargo?

A. I was not involved in the – this negotiation with the stevedoring contract there, so I cannot tell you exactly.

Q. But you know that they're paid a certain amount per ton of cargo they discharge?

A. Yes.

Q. And you know from your own experience that the rate that they can charge you depends upon how quickly they can discharge the cargo?

A. That's right.

Q. And therefore, they wanted to use the spreaders–

MR. BUCHHOLZ: Objection.

BY MR. SOVEL:

Excerpt from Court of Appeals Appendix – 123A

Claus Pavar – Recross/Sovel

Q. You understood that?

A. I understand you.

Q. And you were to have the ships to come in in such a manner that they could use them?

MR. BUCHHOLZ: Objection to the question.

THE WITNESS: I do understand your question.

MR. SOVEL: You do or do not?

THE WITNESS: Yes, I understand your –

BY MR. SOVEL:

Q. Is that not correct?

A. That is correct, because Holt are using chandeliers for operation.

There's no doubt about that.

Q. And the ships are to come in in such a manner that they could use the chandelier spreaders and use forklift trucks?

A. They come in preslung in the squares so after the preslung is out there'll be space for the chandeliers.

Q. And for the forklifts?

A. Oh, no, not for the forklifts?

Q. Not for the forklifts.

Excerpt from Court of Appeals Appendix – 124A

Claus Pavar – Recross/Sovel

A. Not for forklifts. For the chandeliers.

Q. Not – you say not for the forklifts?

A. Yes.

Q. So space for the chandeliers –

A. Yes.

Q. – with the idea that the chandeliers will be able to clear the space for the forklifts?

A. Yes.

MR. SOVEL: Thank you.

No further questions.

MR. BUCHHOLZ: No further questions.

THE VIDEOTAPE OPERATOR: This concludes the deposition.

The time is 11:37

– – –